

CONSTRUCTIVE NOTICE OF A SPOUSE IN ACTUAL OCCUPATION

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[Ms McNicol reviews the authorities concerning constructive notice of the interests of persons in occupation of land under the general law, and in particular critically analyzes the *Caunce v. Caunce* proposition that whenever the vendor is in possession, the purchaser is not affected with notice of the equitable interest of any other person who is resident there and whose presence is consistent with the title offered by the vendor. She submits that this view gravely prejudices a wife with an equitable interest in the matrimonial home, legal title of which is vested in the husband, because a purchaser will never have constructive notice of her interest (since her occupation is consistent with the title offered by the husband) and will always take free of it. The recent case of *Williams and Glyn's Bank v. Boland* is then examined, and the view taken is that the strong disapproval (in obiter) of the reasoning in *Caunce* will allow a wife's occupation with her husband to constitute constructive notice of her interest, and that a purchaser or mortgagee will act at his peril if he neglects to make enquiries of the wife as to any interest she may claim in the subject property. The conveyancing implications of the *Williams* decision both in England and Victoria are outlined. The author advocates that, in order to assimilate the level of protection afforded to a wife in occupation of general law land on the one hand and Torrens law on the other, a specific statutory exception to indefeasibility in her favour should be introduced.]

1. INTRODUCTION

In the recent case of *Williams & Glyn's Bank Ltd v. Boland and Anor* the House of Lords was faced with the situation¹ of a husband and wife who jointly contributed to the purchase of a matrimonial home. The property was however transferred into the husband's name as sole registered proprietor. The husband then mortgaged the property to a bank without the wife's knowledge. When later the husband became unable to repay, the bank issued a summons for possession of the house.

These facts raise complex problems, many of which are of acute practical significance today, especially regarding the nature and extent of the duty on the purchaser of land to enquire as to title or outstanding interests. It is proposed to consider this duty on the purchaser to enquire as to title, in the context of the common law doctrine of constructive notice as it applies in Victoria. The relevance of the doctrine of constructive notice in priority disputes between competing interests in land, both under the general law and the Torrens system in Victoria, will be outlined. A closer examination of the doctrine will reveal that the common law concept of 'occupation' is relevant in determining when a purchaser will be deemed to have constructive notice of a third party. Furthermore the close connection between constructive notice and occupation will be seen

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¹ [1980] 3 W.L.R. 138. Hereinafter referred to as the *Williams* decision.

to have been clear and well-settled up until the case of *Caunce v. Caunce*.² This was because the occupier in question had been a person in sole occupation in which case there was no doubt that a purchaser would be deemed to have constructive notice of the interests of such occupier. The nexus became complicated when the occupier was found to be in occupation together with the vendor. The question then became one as to whether the duty to enquire should be extended beyond persons in sole occupation to other persons who were also in occupation. The problem was highlighted in the area of matrimonial property where naturally a wife, having an interest in the land, would be in occupation with her husband, the vendor. An attempt to resolve the problem was made in the English case of *Caunce v. Caunce* which dealt with unregistered land. This case will be examined in detail. The *Williams* decision, which dealt with similar facts to *Caunce v. Caunce*, but with the land being registered land in England, will then be studied, together with the implications of the decision for England. The result of the *Williams* decision will be seen to be diametrically opposite to the result in *Caunce v. Caunce* in terms of protection afforded to the interest of a wife in the matrimonial home as against a purchaser or mortgagee. The final area then to be discussed will be the overriding implications of the *Williams* decision for the law as it now exists in relation to constructive notice in Victoria, both under general law land and land under the Torrens system.

2. CONSTRUCTIVE NOTICE AND ITS RELEVANCE IN VICTORIA

As Megarry and Wade in *The Law of Real Property* explain, equitable interests would have been entirely insecure if it had been made easy for purchasers to acquire the legal estate without notice by merely asking no questions.³ Consequently the Court of Chancery developed a doctrine of constructive notice which placed a duty on the purchaser to make such inspection of the vendor's land and title as a reasonably prudent purchaser would make.⁴ The purchaser will be deemed to have constructive notice where he has abstained altogether from making enquiries that a reasonable purchaser would have made or where, knowing that the property is in some way encumbered, he fails to investigate the nature of the encumbrance.⁵ In Victoria s. 199 Property Law Act 1958 provides a definition of constructive notice in subsection (1) which reads:

A Purchaser shall not be prejudicially affected by notice of any instrument, fact or thing unless—

(a) it . . . would have come to his knowledge if such enquiries and inspections had been made as ought reasonably to have been made by him.

² [1969] 1 All E.R. 722.

³ Megarry R. E. and Wade H. W. R., *The Law of Real Property* (4th ed. 1975) 121.

⁴ See *Bailey v. Barnes* [1894] 1 Ch. 25, 35.

⁵ *Snell's Principles of Equity* (27th ed. 1973) 50-51.

The definition is an exclusive one and as correctly pointed out by Stamp J. in *Counce v. Counce*⁶ is designed not to extend but to limit the doctrine of constructive notice.⁷

In Victoria the doctrine of constructive notice retains considerable significance. Where for example there is a dispute between the holders of an equitable interest and a subsequent legal interest in land under the general law, the rule is that wherever the subsequent legal estate comes into the possession of a *bona fide* purchaser for valuable consideration without notice of the prior equitable interest, the purchaser takes free of the prior equitable interest.⁸ Actual, constructive or imputed notice⁹ will all be relevant to the question whether the purchaser takes free of the prior interest. The attempts to extend the doctrine of constructive notice in this area will be considered in Part 4 below.

Even under the Torrens system, in a dispute between an equitable interest and a registered legal interest, the doctrine of constructive notice is indirectly relevant. In Victoria, s. 43 Transfer of Land Act 1958 expressly provides that the interest of a person who is registered is immune from 'notice actual or constructive of any trust or unregistered interest'.¹⁰ But this must be read subject to the express exceptions to indefeasibility,¹¹ the most important of which for the purposes of this article is s. 42(2)(e) which stipulates that the land included in any Crown grant or certificate of title shall be subject to the 'interest of a tenant in possession of the land'.

The High Court of Australia in *Barba v. Gas and Fuel Corporation of Victoria*¹² has recently affirmed the view that a tenant in possession under s. 42(2)(e) will have no greater protection than he would have had if the land were under the general law.¹³ Hence the statutory concept of 'possession' under s. 42(2)(e) will not of itself be decisive — such possession must give notice of the equitable interest of the tenant with all its incidents.¹⁴ In *Burke v. Dawes*,¹⁵ another case concerning the application of s. 42(2)(e), constructive notice was a relevant consideration — the tenant's interest

⁶ [1969] 1 All E.R. 722.

⁷ *Ibid.* 727. Section 199(3) establishes clearly the limitations of the above definition.

⁸ *Pilcher v. Rawlins* (1872) 7 Ch. App. 259. For an Australian application of the rule see *Mills v. Stokman* (1967) 116 C.L.R. 61, 72. The issue of notice will also arise in a dispute between a prior equity and a subsequent equitable interest (see *Latec Investments Ltd v. Hotel Terrigal Pty Ltd (in Liq.)* (1965) 113 C.L.R. 265) but this article is concerned only with prior equitable interests. Query however whether constructive notice and not merely actual notice is relevant to a *Latec* dispute.

⁹ As to imputed notice, see s. 199(1)(b) Property Law Act 1958 which defines such notice as broadly that of the purchaser's counsel, solicitor or other agent.

¹⁰ An equitable interest under the Torrens system is necessarily unregistered: see *Barry v. Heider* (1914) 19 C.L.R. 197.

¹¹ Section 43 Transfer of Land Act must be read subject to s. 42 Transfer of Land Act: see *Frazer v. Walker and Radomski* [1967] 1 A.C. 569.

¹² (1977) 51 A.L.J.R. 219.

¹³ This was also the view of the majority in *Burke v. Dawes* (1938) 59 C.L.R. 1.

¹⁴ *Per Smith J. in Downie v. Lockwood* [1965] V.R. 257, 260.

¹⁵ *Op. cit.*

did not prevail over the mortgagee's interest as the mortgagee had neither express nor constructive notice that the executor in granting the mortgage was not acting *bona fide* in discharge of his executorial functions. It is important to note also that judicial interpretation of the expression 'tenant in possession' has been very wide.¹⁶ It will include a purchaser under a contract of sale who at law is in possession as a tenant at will of the vendor.¹⁷ The view of Dixon J. in *Burke v. Dawes* which was affirmed in the *Barba* case¹⁸ was that 'any person in actual occupation of the land obtains as against any inconsistent registered dealing protection and priority for any equitable interest to which his occupation is incident, provided that at law his occupation is referable to a tenancy of some sort, whether at will or for years'.¹⁹ In short, all the cases concerning the application of s. 42(2)(e) demonstrate the reluctance of the courts, even when faced with an unqualified statutory exception, to do away with the common law concept of notice.

Furthermore, where there is a dispute between two equitable interests in land, the doctrine of constructive notice may be invoked to demonstrate that the purchaser of the equitable interest has not been misled by what may otherwise have been postponing conduct on the part of the prior equitable interest holder.²⁰ This is so whether the land is under the Torrens system or general law.²¹ Strictly speaking, the rule in *Rice v. Rice*²² applies in this situation, *i.e.* if the equitable interests are in all other respects equal, priority of time gives the better equity. To determine whether the interests are equal the court must consider *inter alia* the 'whole conduct of each party with respect thereto'.²³ The Privy Council in *Abigail v. Lapin*²⁴ expanded this test by indicating that the 'possessor of the prior equity is not to be postponed to the possessor of a subsequent equity unless the act or omission proved against him has conduced or contributed to a belief on the part of the holder of the subsequent equity, at the time he acquired it, that the prior equity was not in existence'.²⁵ In the recent Victorian case of *Osmanoski v. Rose*²⁶ Gowans J. stressed that for an equitable interest holder to lose his natural priority in time against a subsequent equitable interest holder it must be shown firstly that there was an act or

¹⁶ See *Barba v. Gas & Fuel Corporation of Victoria* (1977) 51 A.L.J.R. 219, 226-227.

¹⁷ *Ibid.*

¹⁸ *Op. cit.* 227.

¹⁹ (1938) 59 C.L.R. 1, 17.

²⁰ *Taddeo v. Catalano* (1975) 11 S.A.S.R. 492, 500; *IAC (Finance) Pty Ltd v. Courtenay* (1963) 110 C.L.R. 550.

²¹ A competition between competing equitable interests can arise under the Torrens system where a purchaser under a contract of sale has not yet registered and in the meantime a subsequent equitable interest is created either by the same method or by some other means, e.g. a mortgage by deposit of duplicate certificate of title.

²² (1853) 2 Drew 73; 61 E.R. 646.

²³ *Ibid.* 648 *per* Kindersley V.-C.

²⁴ [1934] A.C. 491.

²⁵ *Ibid.* 498-9.

²⁶ [1974] V.R. 523.

omission by the prior interest holder and that very act or omission has actually induced the subsequent interest holder to acquire his interest.²⁷ The corollary of this is that a purchaser who knows or ought to have known of the prior equitable interest will not be misled by the otherwise postponing conduct (such as failure to caveat under the Torrens system).²⁸ The case of *IAC (Finance Pty Ltd) v. Courtenay*²⁹ would support this view. In that case, the failure to lodge a caveat by the prior interest holder did not mean that his natural priority was lost because it did not induce a belief that the interest did not exist. Kitto J. stated that the mere lodging of the transfer (by the prior interest holder) gave clear notice that the interest had come into existence and put persons in the position of a subsequent interest holder upon enquiry as to whether the interest had ceased.³⁰ More recently in a claim between competing equitable interests in the Supreme Court of South Australia, Jacobs J. held that it would be inequitable to accord priority to the purchaser's later equitable interest by reason of the possible postponing conduct³¹ on the part of the prior interest holder because the purchaser had deliberately refrained from making enquiries which a prudent purchaser would have made and which would have at least supported the existence of an equitable interest in the claimant.³² Consequently constructive notice will be relevant in Victoria where there are competing equitable interests. The subsequent equitable interest holder cannot be heard to assert any postponing conduct on the part of the prior interest holder because his knowledge, actual or constructive, will satisfy the court that he has not 'come to a court of equity with clean hands'.³³

3. OCCUPATION OR POSSESSION OF UNREGISTERED LAND

In the context of unregistered land, the doctrine of constructive notice is indisputably linked with the concept of occupation or possession. As long ago as 1853, the Privy Council in *Barnhart v. Greenshields*,³⁴ affirmed the already long established principle that possession of a tenant is notice that he has some interest in the land, and that a purchaser having notice of the fact, is bound, according to the ordinary rule, either to enquire what that interest is, or give effect to it, whatever it may be. Throughout the

²⁷ *Ibid.* 528.

²⁸ Under s. 89 Transfer of Land Act 1958 'any person claiming any estate or interest in land under any unregistered instrument or dealing or by devolution in law or otherwise' may lodge a caveat 'forbidding the registration of any person as transferee or proprietor . . .'. At the very least, a caveat will operate as a notice or a warning to the Registrar that some other person (other than the person purporting to register as transferee), has an interest (usually equitable) in the land. No entry of a dealing may be made on the register until notice has been served on the caveator and has expired.

²⁹ (1963) 110 C.L.R. 550.

³⁰ *Ibid.* 579.

³¹ Failure to lodge a caveat.

³² *Taddeo v. Catalano* (1975) 11 S.A.S.R. 492, 500.

³³ *Ibid.* 501.

³⁴ (1853) 14 E.R. 204, 209.

judgment of the Privy Council in that case, the concepts of occupation and possession (which were used interchangeably) were of paramount significance, with the result that the tenant in possession, merely by being an occupier of land, will be protected against the interest of a subsequent purchaser of land. This is given strong support in the judgment of *Hunt v. Luck*³⁵ where Vaughan Williams L.J. demonstrated just how crucial the fact of occupation will be, by affirming that occupation of land by a tenant will affect a purchaser of land with constructive notice of all that tenant's rights but at the same time refusing to extend the effect of such occupation to affect a purchaser with notice of the lessor's title or rights. *Barnhart v. Greenshields* itself showed that notice of a tenancy has no operation whatever as giving notice of the title of the lessor of the tenant who is in possession.³⁶ The case of *Hunt v. Luck* is one of the major forerunners of a series of cases which inextricably interweave the fact of occupation with the doctrine of constructive notice. The Court of Appeal was there concerned primarily with what inquiries ought reasonably to have been made by the intending mortgagees. The Court concluded that the only inquiry which ought reasonably to have been made by the mortgagees was an inquiry to protect themselves against any right which the occupier might have,³⁷ but not against any rights which a third person, such as a lessor who is out of possession might have. Cozens-Hardy L.J. simply could not bring himself to hold that an inquiry ought reasonably to have been made which is not usual.³⁸ It is important to note here that on the facts of both *Hunt v. Luck* and *Barnhart v. Greenshields*, the vendor was not in occupation. Vaughan Williams L.J. in *Hunt v. Luck* was careful to preface his analysis of constructive notice by noting:

If a purchaser or a mortgagee has notice that the vendor or mortgagor is not in possession of the property, he must make inquiries of the person in possession — of the tenant who is in possession — and find out from him what his rights are, and, if he does not choose to do that, then whatever title he acquires as purchaser or mortgagee will be subject to the title or right of the tenant in possession.³⁹

What then are the inquiries that a purchaser must make of a person in possession where the vendor too is in possession? Obviously sooner or later a litigious situation would arise where the vendor was in occupation together with the prior competing interest holder, whether that latter person be a spouse, lodger, *de facto* spouse, relative or any other person living with the vendor on the land. This was the case in *Counce v. Counce*⁴⁰

³⁵ [1902] 1 Ch. 428.

³⁶ (1853) 14 E.R. 204, 210.

³⁷ Compare *Smith v. Jones* [1954] 2 All E.R. 823 where the occupier's right to rectify the tenancy agreement was not protected.

³⁸ The origins of s. 199 Property Law Act can be gleaned from the terminology of Cozens-Hardy L.J.

³⁹ [1902] 1 Ch. 428, 433. The same applies where not just a tenant is in possession but anyone is in sole occupation, e.g. a deserted wife: *National Provincial Bank Ltd v. Hastings Car Mart Ltd* [1964] 1 All E.R. 688, 698 (Lord Denning M.R.).

⁴⁰ [1969] 1 All E.R. 722.

where the court for the first time was forced to decide whether an inquiry into the rights of a wife in possession with her husband was a reasonable inquiry for a bank to make in terms of the recognized doctrine of constructive notice. In other words, would a purchaser be deemed to have constructive notice of the interest or rights of a wife in possession with the vendor, just as he was deemed to have such notice of the interest or rights of the general tenant in possession under *Barnhart v. Greenshields*?

4. UNREGISTERED LAND AND *CAUNCE v. CAUNCE*

In the case of *Caunce v. Caunce*, Stamp J. in the Chancery Division of the High Court of Justice was faced with the situation of a husband and wife who jointly contributed to the purchase of a matrimonial home on terms between themselves that they be joint tenants at law. The husband then, in breach of those terms, procured the conveyance of the property to himself alone. The wife knew at that stage that the husband took a sole conveyance but failed to take any steps to assert her rights. Subsequently the husband created a legal mortgage over the property in favour of a bank without the wife's knowledge and then became unable to repay with the result that the bank issued a summons for possession of the house against the wife.

The first point to note is that the wife in this case had an equitable interest in the matrimonial property. Stamp J. merely stated this fact without analysis. It is well-established that if two or more persons contribute unequally to the purchase price, they are presumed in equity to hold as tenants in common in proportion to their respective contributions.⁴¹ More specifically, in the area of matrimonial property disputes, the Court of Appeal has held that a wife who has directly and substantially contributed to the acquisition of a home obtains an equitable interest in the home by way of trust imposed on the husband.⁴² As Lord Denning explains '[e]ven though the house is taken in the husband's name alone, the law imposes a trust on him by which he holds the legal estate in trust for them both jointly in such shares as justice requires'.⁴³ Under the Law of Property Act 1925 (Eng.) the nature of the wife's interest is further complicated because it is an undivided share in land which can only take effect in equity behind an implied trust for sale.⁴⁴ This raises questions as to whether the trustee or trustees for sale can 'overreach' the trust by selling the land so as to give a good title to a purchaser free of any equitable interest. If so, the trustees under the English Act are bound to apply the proceeds for sale for

⁴¹ *Robinson v. Preston* (1858) 4 K. & J. 505; 70 E.R. 211; *Bull v. Bull* [1955] 1 Q.B. 234.

⁴² *Williams & Glyn's Bank Ltd v. Boland & Anor* [1979] 2 All E.R. 697, 703. This point was assumed by the House of Lords on appeal in the same case: [1980] 3 W.L.R. 138.

⁴³ [1979] 2 All E.R. 697, 703.

⁴⁴ Section 36 Law of Property Act 1925 (Eng.).

the benefit of those beneficially entitled.⁴⁵ This issue, which is peculiar to the English law on trusts for sale, is not relevant to this article.⁴⁶ It is sufficient here to note that a wife who contributes to the purchase of the matrimonial home does have an equitable interest in land.

Secondly and more importantly, Stamp J. held that the bank did not have constructive notice of the wife's equitable interest and could therefore take free of the wife's interest. The wife had sought to fix the bank with notice of her interest on two grounds. First, she claimed that her bank account itself affected the bank with constructive notice of her equitable interest in the property, as she had been the bank's customer five years earlier when she had withdrawn money to contribute to the purchase price. This was rejected by Stamp J. An enquiry into the details of the wife's bank account with a view to ascertaining whether she had provided a part of the purchase price was not an enquiry which ought reasonably to have been made within the meaning of s. 199 (1)(ii) of the Law of Property Act 1925 (Eng.).⁴⁷ Secondly, she claimed that her occupation of the property affected the bank with constructive notice of her interest and that an enquiry ought to have been made into her rights as such an occupier. Stamp J. decided that this too was not an enquiry which ought reasonably to have been made by the bank. But having reached this decision, Stamp J. was then compelled to explain why the occupation of the wife on the facts of the case before him was *not* such an occupation as would automatically give notice of the interest to which it is incident. In other words he had to justify his avoidance of the inescapable proposition in *Barnhart v. Greenshields* that occupation *per se* gives constructive notice of all the rights to which that occupation is incident. He attempted to do this in two ways. First he stated that a wife is not in apparent occupation or possession. She is there ostensibly because she is the husband's wife and her presence there is wholly consistent with the husband's title. Secondly, he stated that wherever the vendor is in possession, the purchaser will not be affected with notice of the equitable interest of *any other person* who may be resident there and whose presence is wholly consistent with the title offered. Each of these reasons will be examined in turn.

To support his first view, Stamp J. stated that the marriage relationship should be protected from an enquiry which would be 'as embarrassing to

⁴⁵ Sections 2(1)(ii), 2(2) and 27(2) of the Law of Property Act 1925 (Eng.) and ss. 14(2) and 36(6) of the Trustee Act 1925 (Eng.). Note: It has been claimed that *Counce v. Counce* seems to establish *sub silentio* that a single trustee for sale can convey a legal estate in such a manner as to overreach the equities arising under the trust for sale, provided the grantee is a *bona fide* purchaser for value without notice, actual or constructive. See Garner J. F., 'A Single Trustee for Sale' (1969) 33 *Conveyancer and Property Lawyer* (N.S.) 240, 242.

⁴⁶ This point was discussed by the Court of Appeal in *Williams* case: (C.A.) *op. cit.* 703, 710 and by Lord Wilberforce in the appeal of that case to the House of Lords: [1980] 3 W.L.R. 138, 144-146.

⁴⁷ [1969] 1 All E.R. 722, 727. Section 199(1)(ii) is identical to s.199(i)(a) Property Law Act 1958 (Vic.).

the enquirer as it would be in my view intolerable to the wife and husband' and that it is 'not in the public interest that bank mortgagees should be snoopers and busybodies in relation to wholly normal transactions of mortgages'.⁴⁸ He stated that he has never heard it suggested that where one finds a vendor and his wife living together on the property a prudent solicitor acting for the purchaser ought to enquire of the wife whether she claims an interest in the house.⁴⁹ It will be seen below that more recently, Lord Denning M.R., in the context of registered land in England, not only suggested such a practice but intimated that such an enquiry would today be imperative.⁵⁰ Lord Wilberforce in the *Williams* decision⁵¹ strongly rejected the bank's argument that the wife's 'occupation' was nothing but the shadow of the husband's — presumably a version of the doctrine of unity of husband and wife. Such a view appeared to his Lordship to 'be heavily obsolete'.⁵² It will be seen below that the effect of the *Williams* decision itself, namely that a wife's interest in land under the Land Registration Act 1925 (Eng.) should be an 'overriding' one and hence have priority over a purchaser, is diametrically opposed to the 'exceptionally insecure'⁵³ equitable interest of a spouse under unregistered land which may be defeated at any time by a purchaser who will never have constructive notice of it. The dislocation is highlighted in Stamp J.'s view that 'in this day and age husbands and wives ought to be able to bank at the same bank without having their accounts analysed by the bank in order to find out if one of them is deceiving the other'.⁵⁴ The fact that the 'concurrence of the wife would be necessary for all dealings', an assumption which may be overstated by Stamp J., does not seem to worry Lord Denning or the House of Lords. In fact Lord Denning in the *Williams* decision somewhat dramatically concluded that 'if a bank is to do its duty, in the society in which we live, it should recognize the integrity of the matrimonial home'.⁵⁵ Furthermore his far-reaching policy reasons were disclosed in the statement '[w]e shall not give monied might priority over social justice'.⁵⁶ While it is conceded that Stamp J. was clearly concerned with protecting a wife from enquiries into her rights, it is submitted that in giving such protection,

⁴⁸ [1969] 1 All E.R. 722, 728.

⁴⁹ *Ibid.*

⁵⁰ *Williams and Glyn's Bank Ltd v. Boland and Anor* (C.A.) [1979] 2 All E.R. 697. Hereinafter referred to as the *Williams* decision (C.A.).

⁵¹ [1980] 3 W.L.R. 138.

⁵² *Ibid.* 144. Lord Denning M.R. in the Court of Appeal stated he 'profoundly disagreed' with the decision in *Caunce v. Caunce* that the wife is not in occupation. Such statements, he claimed, would have been true a hundred years ago but were not true today: [1979] 2 All E.R. 697, 705. Browne L.J. in the same case stated it was 'unrealistic and anachronistic' to talk of a wife's occupation as being only a shadow of her husband's occupation: at 714. Ormrod L.J. referred to it as an 'absurd conclusion', at 711.

⁵³ Megarry R. E. and Wade H. W. R. *op. cit.* 447.

⁵⁴ [1969] 1 All E.R. 722, 727.

⁵⁵ [1979] 2 All E.R. 697, 706.

⁵⁶ *Ibid.*

Stamp J. was gravely prejudicing a wife because the fact that no enquiries are required will mean a purchaser will never have constructive notice of her interest and will always take free of it. The *Williams* case would demand that such protection from enquiries should be sacrificed to the cause of her overriding interest. Lord Denning M.R. held that anyone who lends money on the security of a matrimonial home nowadays ought to realize that the wife may have a share in it and ought to make sure that the wife agrees to the transaction or go to the house and make enquiries of her.⁵⁷ This approach, upheld in the House of Lords, is a sensible one as it draws the husband/wife situation into line with the general tenant-in-possession situation. The arguments for such an assimilation in unregistered land cases will be examined below. It is sufficient to note here that if *Counce v. Counce* were decided the same way today, the wife's interest would not be protected and the purchaser would be relieved of the task of enquiring into the wife's rights where the land is unregistered. On the other hand, the reverse would apply where the land is registered land in England.

The second reason for the decision in *Counce v. Counce* does not concern the marriage relationship but is a far more general proposition. Stamp J. explained that if the vendor is in occupation of a property then one is no more fixed with notice of the equitable interest of the vendor's wife who is living there with him than one would be affected with notice of the equitable interest of any other person who is resident on the premises, for example the vendor's father, his Uncle Harry or his Aunt Matilda, any of whom might have contributed money towards the purchase of the property.⁵⁸ Stamp J. reasoned that where the vendor is in possession, the presence of his wife or guest or lodger implied nothing to negative the title offered. 'It is otherwise if the vendor is not in occupation and one finds another party whose presence demands an explanation and whose presence one ignores at one's peril.'⁵⁹ This view has subsequently been discredited. Russell L.J. in *Hodgson v. Marks*⁶⁰ attempted to confine the decision in *Counce v. Counce* to the husband/wife situation and then added, 'in so far however as some phrases in the judgment might appear to lay down a general proposition that enquiry need not be made of any person on the premises if the proposed vendor himself appears to be in occupation, I would not accept them'.⁶¹ Lord Wilberforce in the *Williams* decision expressly agreed with Russell L.J. on this point, stating that 'the presence of the vendor with occupation, does not exclude the possibility of occupation of others'.⁶²

⁵⁷ *Ibid.*

⁵⁸ [1969] 1 All E.R. 722, 728.

⁵⁹ *Ibid.*

⁶⁰ [1971] 2 All E.R. 684.

⁶¹ *Ibid.* 690.

⁶² [1980] 3 W.L.R. 138, 144.

Stamp J.'s decision that anyone in residence with the vendor will not be protected rests on the assumption that such residence is consistent with the vendor's and thus demands no explanation. Lord Wilberforce in the *Williams* decision highlighted the impracticality of such an assumption when he gave the example of a man living with his mistress, or, for that matter, two persons of the same sex, living in a house in separate or partially shared rooms and asked; 'are these cases of apparently consistent occupation so that the rights of the other person (other than the vendor) can be disregarded⁶³ or are they cases of inconsistent occupation and hence rights which will be protected? Not only will it be extremely difficult to draw the line between those persons whose occupation is consistent with the vendor's and those whose occupation is not, but the consequences of such a decision may well be arbitrary and unfair. If, for example, one concedes that the wife's occupation is consistent with her husband's, then her rights will never be protected, as in *Caunce v. Caunce*. If, on the other hand, occupation by *de facto* wife is said to be inconsistent, then her interest in the land will be protected by giving notice to the purchaser. Should a *de facto* wife be given more protection than a wife? What of a lodger who is living *with* the vendor? If the lodger's possession is said to be consistent with that of the vendor then the peculiar result will be that the lodger's rights can be defeated where he is living with the vendor, but if he is a tenant in sole possession⁶⁴ he will always be protected. Not only would Stamp J.'s consistency argument be undesirable for uncertainty in result, it would be unreasonable to insist a purchaser enquire of some occupiers but not of others. Russell L.J. in *Hodgson v. Marks* stated that there was no real practical problem in having a purchaser enquire of all occupiers other than the vendor of the land. Nor did he consider it correct in law to say that any rights of a person in occupation will always be overridden whenever the vendor appears to be in occupation.⁶⁵ Lord Denning M.R. in *Williams* pointed out that the practice of the Land Registry in England is to issue a warning that enquiries should be addressed to any persons in occupation of the land as to their rights of occupation.⁶⁶ Lord Wilberforce considered a more careful enquiry into the rights of occupiers could not today be considered an unacceptable practice.⁶⁷

In conclusion, if the second proposition of Stamp J. is to be rejected, namely that anyone in occupation with the vendor cannot be protected against a subsequent purchaser because his presence is consistent with the

⁶³ *Ibid.* Lord Wilberforce did not need to answer such a question as the physical fact of occupation was all that was required for an application of s. 70(1)(g) Land Registration Act 1925 (Eng.).

⁶⁴ *Barnhart v. Greenshields*, *op. cit.* Note: a tenant's possession must necessarily be exclusive: *Radaich v. Smith* (1959) 101 C.L.R. 209.

⁶⁵ [1971] 2 All E.R. 684, 688.

⁶⁶ [1979] 2 All E.R. 697, 701. In Victoria, Standard Requisitions on Title ask who is in occupation of the property and in what capacity.

⁶⁷ [1980] 3 W.L.R. 138, 147.

vendor, then this would mean that the first proposition of Stamp J. must also be rejected, namely that a wife cannot be protected because her presence is consistent with the vendor. The Court of Appeal and House of Lords have strongly rejected as obsolete, anachronistic and unrealistic the idea that a wife's occupation is a mere shadow of that of her husband. This however was decided in the context of what constituted 'actual occupation' for the purposes of s. 70(1)(g) Land Registration Act 1925 (Eng.). Lord Wilberforce stressed that with registered land, it was the physical fact of occupation that mattered whereas with unregistered land, the purchaser's obligation depended on that of which he had notice — actual or constructive.⁶⁸ But if one considers the trend, particularly in the last ten years, of legislative and judicial protection of a wife and her property, then there should be no difference today between a wife's statutory 'occupation' for the purposes of s. 70(1)(g) and her common law 'occupation', which will give constructive notice of her rights. It is not proposed in this article to outline the development of the wife's protection which is easily discernible from sections such as s. 79 and s. 114 of the Family Law Act 1975 (Cth)⁶⁹ and judicial attitudes reflected in cases such as *Gissing v. Gissing*,⁷⁰ *Allen v. Snyder*,⁷¹ and *Hohol v. Hohol*.⁷² It is sufficient to remark that a wife today will be treated in law as a separate legal and economic person and will be subjected to a much lesser degree of uncertainty, injustice or discrimination. Accordingly it would be safe to predict that her interest in the matrimonial home where the land is unregistered will be protected against third parties due to her more clearly defined status as shown in the *Williams* case.⁷³

5. THE WILLIAMS DECISION AND ITS IMPLICATIONS

In the recent case of *Williams and Glyn's Bank Ltd v. Boland and Anor*⁷⁴ the House of Lords was faced with the situation of a husband and wife who jointly contributed to the purchase of a matrimonial home. Clearly this made them equitable tenants in common to the extent of their respective contributions.⁷⁵ The property, being registered land, was transferred into the sole name of the husband who became its registered proprietor. Subsequently the husband, without the wife's knowledge, mortgaged the property by legal mortgage to a bank, which made no

⁶⁸ *Ibid.* 143.

⁶⁹ Section 79 empowers the Family Court to make discretionary property orders. Prior to proceedings for principal relief, s. 114 confers a wide discretion on the Family Court to grant injunctions in proceedings arising out of a marital relationship and to penalize those who do not comply with an injunction.

⁷⁰ [1971] A.C. 886.

⁷¹ [1977] 2 N.S.W.L.R. 685. See also Wade J., 'Trusts, The Matrimonial Home and DeFacto Spouses' (1979) 6 *University of Tasmania Law Review* 97.

⁷² (1980) F.L.C. 90-824.

⁷³ See Ormrod L.J.'s prediction in the light of the Matrimonial Proceedings Act 1970 (Eng.), the *Williams* decision (C.A.) [1979] 2 All E.R. 697, 708 and Lord Denning M.R.'s exposition of the wife's recognition today: at 705-6.

⁷⁴ [1980] 3 W.L.R. 138.

⁷⁵ See facts summarized by Lord Wilberforce: [1980] 3 W.L.R. 138, 141.

enquiries of the wife. The husband then became unable to repay the mortgage and the bank thereupon issued a summons for possession of the house against the wife. As Lord Wilberforce stated, the question was whether the legal and registered mortgage took effect against the matrimonial home, or whether the wife's beneficial interest had priority over it.⁷⁶

The House of Lords unanimously affirmed the decision of the Court of Appeal⁷⁷ that the wife was a 'person in actual occupation' within s. 70(1)(g) of the Land Registration Act 1925 (Eng.) which protected her right as an equitable tenant in common. Although the wife's interest was an equitable interest capable of being overreached and therefore a 'minor interest' within s. 3(XV)(a), it was also capable of being, and was, an overriding interest because it was protected by 'actual occupation'. Accordingly the bank's charge was subject to the wife's interest and the wife was entitled to possession as against the bank. Lord Wilberforce, with whom Viscount Dilhorne, Lord Salmon and Lord Roskill agreed, identified two issues. First he had to decide whether the wife was a 'person in actual occupation' within the meaning of s. 70(1) of the Land Registration Act 1925 (Eng.) which states:

All registered land shall . . . be deemed to be subject to such of the following overriding interests as may be for the time being subsisting in reference thereto, (g) The rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where enquiry is made of such person and the rights are not disclosed.

Lord Wilberforce had no difficulty in concluding that a spouse, living in a house, had an actual occupation capable of conferring protection, as an overriding interest, upon the rights of that spouse. The words 'actual occupation' were ordinary words of plain English and connoted a physical presence on the land rather than some kind of legal possession, as by receipt of rents and profits. His Lordship cited *Barnhart v. Greenshields* to support this view.⁷⁸ Once occupation existed as a fact, it protected the rights, if any, of the person in occupation.⁷⁹ His Lordship systematically rejected all three arguments taken from *Counce v. Counce* to support the view that the wife was not in occupation.⁸⁰

In reaching this conclusion, Lord Wilberforce stressed that the doctrine of notice, actual or constructive, was irrelevant in the case of registered land. What was involved was an interpretation of the relevant provisions of the Land Registration Act 1925 (Eng.) and nothing else.⁸¹ Where the land is unregistered, the purchaser's obligation depended on that of which

⁷⁶ *Ibid.*

⁷⁷ Consisting of Lord Denning M.R., Ormrod and Browne L.JJ. [1979] 2 All E.R. 697.

⁷⁸ [1980] 3 W.L.R. 138, 143.

⁷⁹ *Ibid.* 144.

⁸⁰ *Ibid.* Refer to Part 4 of this Article.

⁸¹ *Ibid.* 142, 143. Compare Russell L.J. in *Hodgson v. Marks*, *op. cit.* 688 who assumes that occupation under s. 70(1)(g) is only such occupation which would bind a purchaser with constructive notice in the case of unregistered land.

he had notice, whereas where the land was registered, it was the fact of occupation that mattered. If there was actual occupation and the occupier had rights, the purchaser took subject to them. If not, he did not. No further element was material.⁸² His Lordship also conceded that the doctrine of notice still remained a 'potential source of danger' to purchasers of unregistered land who were often involved in quite elaborate enquiries, failing which they might be bound by equities.⁸³

Secondly, Lord Wilberforce had to decide whether the wife's equitable interest under the trust for sale was capable of being an overriding interest or whether, as was generally the rule regarding equitable interests, it could only take effect as a 'minor interest'. In the latter event, a registered transferee would take free from it unless the minor interest holder had protected herself by lodging a caution.⁸⁴ His Lordship found this argument a formidable one, but he nonetheless concluded that there was no firm dividing line between minor interests and overriding interests, the fact of occupation being enough to convert a minor interest to an overriding one. Hence the wife's equitable interest, by the fact of occupation was made into an overriding interest and protected by s. 70(1)(g). It made no difference, in his Lordship's opinion, that the same interest might have been capable of protection by the registration of a caution.⁸⁵

Lord Wilberforce also considered the conveyancing consequences of holding in favour of the wife:

What is involved is a departure from an easy-going practice of dispensing with enquiries as to occupation beyond that of the vendor and accepting the risks of doing so. To substitute for this a practice of more careful enquiry as to the fact of occupation . . . can not . . . be considered as unacceptable except at the price of overlooking the widespread development of shared interests of ownership.⁸⁶

Lord Wilberforce used the cloak of diffusion of property and earning capacity to justify the adoption of more 'troublesome' and inconvenient enquiries by purchasers. This view is to be strongly contrasted with his Lordship's judgement in *National Provincial Bank Ltd v. Ainsworth*⁸⁷ where he used the policy reason of practical inconvenience to a purchaser to justify overruling the majority of cases enforcing the deserted wife's equity. In the latter case his Lordship strongly disapproved of a third party, when seeking to take title to the property, being expected to enquire as to the fact of occupation, thereby involving himself in 'matrimonial complications'.⁸⁸

⁸² *Ibid.* 143. This should be compared to the High Court of Australia's attitude to s. 42(2)(e) Transfer of Land Act 1958 (Vic.) in *Barba v. Gas and Fuel Corporation of Victoria* (1977) 51 A.L.J.R. 219. Refer to Part 2 of this Article.

⁸³ *Ibid.* 142.

⁸⁴ *Ibid.* In Victoria, a caution has the same effect as a caveat under the Transfer of Land Act 1958. See *supra* n. 26.

⁸⁵ [1980] 3 W.L.R. 138, 146.

⁸⁶ *Ibid.* 147.

⁸⁷ [1965] 2 All E.R. 472.

⁸⁸ *Ibid.* 495-6.

The change in judicial attitude in favour of a tightening up of conveying practice is reflected even more strongly in Lord Scarman's judgement in the *Williams* decision. His Lordship considered the difficulties to bankers and solicitors to be exaggerated: these groups existed to provide services to the public and they could — as successfully proven in the past — adjust their practice if socially required.⁸⁹ Lord Scarman in other respects agreed with the decision of Lord Wilberforce, adding that the social consequences of the decision could be taken into account if s. 70(1)(g) was reasonably capable of a meaning conducive to the social purpose. His Lordship concluded that the ordinary meaning of the words did meet the dictates of social justice, which was concerned with strengthening the wife's interest in the matrimonial home.⁹⁰ His Lordship agreed with Lord Wilberforce that the registered land situation under s. 70(1)(g) should be kept separate from the unregistered land situation. He distinguished clearly the statutory concept of 'occupation' from the common law 'occupation' which gives constructive notice to a purchaser of the rights of the occupier. Consequently, while doubting that *Caunce v. Caunce* was correctly decided, he found it unnecessary to express a final opinion upon the point.⁹¹

The implications of the *Williams* decision for England are potentially enormous. *Prima facie*, all registered land in England shall be deemed to be subject to the rights of every person in actual occupation. This will not stop at a spouse. Even Lord Wilberforce somewhat timidly confessed that the area of risk to purchasers had been extended beyond anything on the register, 'to include possible interests of spouses, and indeed, in theory, of other members of the family or even outside it'.⁹² The scope is obviously yet to be tested but examples, such as a holder of an equity of acquiescence, a contractual licensee, an adverse possessor or a tenant at will, spring to mind. The problem with Lord Wilberforce's decision as it now stands is that he does not appear to have limited the protection given by s. 70(1)(g) to the holder of a recognized proprietary interest. His Lordship concentrated on the physical fact of occupation and whether the person in occupation had rights.⁹³ Should this be held to include, for example, a contractual licensee, or the holder of an equity of acquiescence, then the next question to be asked is whether such persons have to be aware of their interest and more importantly, if they do not, how will a mortgagee or bank ever know that such person has an interest? It appears, in other words, that a purchaser will be bound by everyone in occupation merely

⁸⁹ [1980] 3 W.L.R. 138, 148.

⁹⁰ *Ibid.*

⁹¹ *Ibid.* 149.

⁹² *Ibid.* 147.

⁹³ *Ibid.* 144. Compare Lord Denning M.R.'s statement in *National Provincial Bank Ltd v. Hastings Car Mart Ltd* [1964] 1 All E.R. 688, 696 that 'rights' under s. 70(1)(g) should not be confined to proprietary rights, with the House of Lords' view in *National Provincial Bank Ltd v. Ainsworth* [1965] 2 All E.R. 472, 481, 489, 502.

because they are in occupation. Clarification is needed as to whether a person with rights who is in occupation must be the holder of a proprietary interest to gain protection. Lord Scarman's judgement is more helpful here as he expressly stipulated three requirements for s. 70(1)(g): the wife must be in 'actual occupation' in the ordinary meaning of the words; she must enjoy 'rights'; and these rights must 'subsist in reference' to registered land.⁹⁴ If these three requirements are rigidly adhered to, then this could be an effective limitation on the subsection, bringing its effect much closer to the protection of a proprietary interest. Lord Scarman, however, tended to amalgamate the first two requirements by defining the 'rights' the wife enjoyed under the second requirement as merely a 'right to occupation'.⁹⁵ If the right had been expressed as the right of an equitable tenant in common then an inherent limitation in the subsection would have been more apparent. The argument for saying that the subsection has been given a very broad effect is strengthened when the rigid division between registered land and unregistered land by both Lords Wilberforce and Scarman is considered. Lord Scarman clearly distinguished statutory 'occupation' from common law 'occupation', only the latter of which will be deemed to constitute constructive notice to a purchaser of the rights of the occupier. Statutory 'occupation' under s. 70(1)(g) may well take on unlimited dimensions.

There are, however, means of limiting the wide effect given to s. 70(1)(g). The conveyancing difficulties resulting from the *Williams* decision in the Court of Appeal were bemoaned by several writers⁹⁶ many of whom were concerned with the method of drafting enquiries to persons in occupation, whether by means of requisitions or doorstep investigations. It has been alleged that one result of the Court of Appeal decision was uncertainty — for practical purposes, what enquiries should purchasers or mortgagees make and of whom?⁹⁷ Another criticism is that the purchaser would be required to ask awkward and sensitive questions, thus complicating conveyancing procedures.⁹⁸ However there is a short answer to these complaints. What could be simpler than a common form printed letter automatically sent to the occupiers of the property other than the vendor?⁹⁹ A court will invariably look at whether any enquiries were in fact made. It is important not to underestimate the effect of s. 70(1)(g) which expressly protects the purchaser where enquiry is made of such a person (in actual occupation) and the rights are not disclosed. The Court of

⁹⁴ *Ibid.* 149.

⁹⁵ *Ibid.* 159.

⁹⁶ See Smith R. J., 'Overriding Interests and Wives' (1979) 95 *Law Quarterly Review* 501, 505; Prichard M. J., 'Registered Land — Overriding Interests — Actual Occupation' (1979) 38 *Cambridge Law Journal* 254, 256; Kidd J. E., 'Lending after the Williams and Glyn's Case' (1979) 129 *New Law Journal* 1159; Wilkinson H. W., 'Wives in Actual Occupation' (1979) 129 *New Law Journal* 700.

⁹⁷ Kidd J. E., *ibid.* 1160.

⁹⁸ Smith R. J., *ibid.* 505.

⁹⁹ Smith R. J., *ibid.* 505 recommends this practice but sending it to the wife only.

Appeal in both *Hodgson v. Marks*¹ and the *Williams*² case was profoundly influenced by the fact that the mortgagee made no enquiries at all. Russell L.J. in *Hodgson v. Marks* pointed out that a purchaser must pay heed to anyone occupying the premises. He stated that 'the plaintiff was there for the first defendant to see and he saw her on two occasions. He did not introduce himself to her as an intending purchaser. He made no enquiry of her'.³ Russell L.J. was obviously not confining his decision to a mere application of the statute. Underlying his decision was revealed a duty on a purchaser to enquire of an occupier over and above the vendor. The consequences, should he fail to do so, will be fatal. But on the other hand, if he sent a standard letter inquiring of the occupier, he will automatically be protected by s. 70(1)(g) should he not receive an answer disclosing the occupier's rights. Lord Denning M.R. at the Court of Appeal level in the *Williams* decision, after referring to the practice of the Land Registry, which was to issue a warning that enquiries should be addressed to any persons in occupation as to their rights of occupation, reprovingly indicated that no such enquiries were made by the bank in the instant case.⁴ It can be seen from this attitude that the policy consideration of the purchaser's conduct will inevitably take the court, when dealing with registered land, beyond the concept of 'actual occupation' which, according to the House of Lords, is an absolute and sufficient criterion in itself. If the court will not consider the purchaser's conduct in the name of policy,⁵ they will be compelled to it because of the framework of the Land Registration Act 1925 (Eng.) itself, which expressly exempts the purchaser in s. 70(1)(g) when he has enquired of the occupier and the latter's rights are not disclosed.

6. THE IMPLICATIONS OF THE WILLIAMS DECISION FOR VICTORIA

The *ratio decidendi* of the *Williams* decision is *prima facie* irrelevant to the Victorian position. There are no 'overriding' interests under the Victorian Transfer of Land Act 1958 which protect 'the rights of every person in actual occupation of the land'. The Victorian counterpart to overriding interests under the English Act are the express statutory exceptions to indefeasibility contained in s. 42(2) Transfer of Land Act 1958. However, the strong disapproval of *Caunce v. Caunce* in *obiter dicta* by the House of Lords (and earlier in the Court of Appeal) suggests that the decision may have repercussions for Victoria. It has been seen that

¹ [1971] 2 All E.R. 684.

² [1979] 2 All E.R. 697.

³ [1971] 2 All E.R. 684, 688.

⁴ [1979] 2 All E.R. 697, 701.

⁵ Because the House of Lords confined their decision to an application of the Land Registration Act 1925 (Eng.) only and was not prepared to proceed beyond the framework of this Act: see Lord Wilberforce, *op. cit.* 142; *per* Lord Scarman 148.

Lord Wilberforce systematically rejected all three arguments put forward by Stamp J. in *Counce v. Counce* to support his decision that the wife was not in occupation so as to give constructive notice of her rights.⁶ Lord Scarman was 'by no means certain that *Counce v. Counce* was correctly decided'.⁷ This strong disapproval, combined with both the long established practice of protecting occupation⁸ and the recent protection given to wives in other matrimonial and property matters,⁹ leads one to the inevitable conclusion that a wife living with her husband today will be in occupation of unregistered land so as to give constructive notice of her rights to a purchaser.¹⁰ Therefore it is submitted that where there is a dispute between the holders of an equitable interest and a subsequent legal interest in land under the general law in Victoria, a purchaser will be deemed to have notice of the interest of a wife in possession with her husband where the purchaser has abstained altogether from making enquiries that a reasonable purchaser would have made or where, knowing that the property is in some way encumbered, fails to investigate the nature of the encumbrance.¹¹

However, as far as the Torrens system is concerned, the position will remain unaffected by the *Williams* decision. There are only two ways a wife in the same fact situation as the *Williams* decision could be protected in Victoria. One is if she caveated under s. 89 Transfer of Land Act 1958 to protect her interest. This would operate as notice on the register that she has an interest in the property. The other is if she was held to be a 'tenant in possession of the land' under s. 42(2)(e) Transfer of Land Act 1958. Such possession would give notice of the equitable interest of the tenant with all its incidents.¹² While the first alternative would be an effective means of protection in terms of achieving a practical result, in many cases it would be inconvenient, unreasonable and thought of too late. It should be sharply contrasted with the more satisfactory situation of registered land in England where the wife receives automatic statutory protection. It would be unfair in many cases to expect a wife to caveat to protect an interest so nebulous as an equitable interest arising out of a constructive trust — she might be unaware that she ever acquired it or, being so aware, she might quite rightly believe that to caveat is a particularly cautious and defensive action to take when she is 'living at home in peace with her husband'.¹³

⁶ [1980] 3 W.L.R. 138, 144. Refer Part 4 of this Article.

⁷ *Ibid.* 149. However Lord Scarman found it unnecessary to express a final opinion upon the point because it dealt with unregistered land.

⁸ Which Lord Wilberforce recognized in the *Williams* decision. *Ibid.* 147.

⁹ Refer to conclusion to Part 4 of this Article.

¹⁰ This might not just be limited to a wife. Any person in occupation with the vendor may today be said to be in such occupation, so as to give constructive notice of his or her rights. See Russell L.J. in *Hodgson v. Marks op. cit.* 690 and Lord Wilberforce's express approval of this point in the *Williams* decision, *op. cit.* 144.

¹¹ The rule in *Pilcher v. Rawlins* (1872) 7 Ch. App. 259. Refer Part 2 of this Article.

¹² *Per* Smith J. in *Downie v. Lockwood* [1965] V.R. 257, 260.

¹³ *Per* Lord Denning M.R. in the *Williams* case, *op. cit.* 702.

The only other alternative form of protection for the wife under the Torrens system is to argue that she is a 'tenant in possession of the land'. In Victoria, s. 43 Transfer of Land Act 1958 expressly provides that the interest of a person who is registered is immune from 'notice actual or constructive of any trust or unregistered interest'. But this must be read subject to the express exceptions to indefeasibility, which are exceptions analogous to the 'overriding' interests under the Land Registration Act 1925 (Eng.). Section 42(2)(e) of the Victorian Act stipulates that the land included in any Crown grant or certificate of title shall be subject to the 'interest of a tenant in possession of the land'. The High Court's approach to s. 42(2)(e) as seen in the *Barba* case¹⁴ is to be strongly contrasted to the House of Lord's approach to s. 70(1)(g) of the Land Registration Act 1925 (Eng.). The House of Lords has made the consequences of occupation absolute rather than a mere matter of constructive notice. The High Court, on the other hand, has recently stated that a tenant in possession under s. 42(2)(e) will have no greater protection than he would have had if the land were under the general law.¹⁵ The statutory concept of 'possession' under s. 42(2)(e) will not be decisive — it must 'give notice of the equitable interest of the tenant'.¹⁶ If then it is argued that today the occupation of a wife who is living with her husband is such occupation as under general law will give notice of her interest, can it be said that the High Court will be obliged to hold that a wife is a tenant in possession under s. 42(2)(e)? The High Court has traditionally been desirous of only giving s. 42(2)(e) the effect it would have had if the land were under general law. If the Court in the general law land situation extends its protection to the interest of a wife will the court also be compelled to include the wife's interest under s. 42(2)(e) in order to fulfill the general policy of keeping equal the extent of protection to occupiers under both systems of land? Probably not.

The difficulty with the above argument is that a wife is not a tenant. The view of Dixon J. in *Burke v. Dawes*¹⁷ was affirmed in the *Barba* case that the occupation under s. 42(2)(e) 'must be referable to a tenancy of some sort, whether at will or for years'.¹⁸ How can the holder of an equitable interest under a constructive trust be said to be a tenant of any sort? One of the substantive requirements of a tenancy is exclusive possession¹⁹ which a wife will not have when living with her husband. Even if it was argued that a wife was a tenant at the will of her husband, this is not recognizing the full extent or status of her interest. The interest

¹⁴ *Op. cit.*

¹⁵ *Barba v. Gas and Fuel Corporation of Victoria* (1977) 51 A.L.J.R. 219, 227. Refer Part 2 of this Article.

¹⁶ See *supra* n. 12.

¹⁷ (1938) 59 C.L.R. 1, 17.

¹⁸ (1977) 51 A.L.J.R. 219, 227.

¹⁹ *Radaich v. Smith* (1959) 101 C.L.R. 209.

of a tenant at will can be revoked at any time. The holder of an equitable interest under a constructive trust has a proprietary interest with a much greater sphere of enforceability than the interest of a mere tenant at will pending revocation. It is too difficult in this context to give the same protection to a wife's interest in land under general law as to land under the Torrens system. Lord Wilberforce foreshadowed similar difficulties in the *Williams* case when he stressed that the unregistered land situation which was concerned with notice should be kept separate and distinct from the registered land situation which was concerned only with express statutory exceptions.²⁰ Although policy and fairness dictate that a wife's interest also be protected against a purchaser where the land is under the Torrens system, this can only be possible 'if the particular statutory provision under review is reasonably capable of the meaning conducive to the special purpose'.²¹ If it is not, to use Lord Scarman's words, the remedy is to be found not by judicial distortion of the language used by Parliament but in amending legislation.²² If s. 42(2)(e) were amended to read 'the interest of any person in possession' similar to the English provision, or, if this were considered too wide, then to read 'the interest of a wife in possession' then the protection given to such occupiers would be kept at a level much closer to the protection which arguably will apply to the same occupiers of land under the general law. The amendment would also mean that the wife would not have to caveat as the express statutory protection would supercede the need to protect her interest by notice on the register.²³

How will the *Williams* decision affect the case where there is a dispute between two equitable interests in land? In this situation the doctrine of constructive notice may be invoked to demonstrate that the purchaser of an equitable interest has not been misled by what may otherwise have been postponing conduct on the part of the prior equitable interest holder.²⁴ This is so whether the land is under the Torrens system or general law. As has already been stated in this article, Gowans J. in *Osmanoski v. Rose*²⁵ held that for an equitable interest holder to lose his natural priority in time against a subsequent equitable interest holder it must be shown that there was an act or omission by the prior interest holder and that that very

²⁰ *Op. cit.* 143. Although note that Lord Wilberforce uses the cases of *Taylor v. Stibbert* (1794) 2 Ves. Jun. 437, 439-440 and *Barnhart v. Greenshields*, *op. cit.* to help define the words 'actual occupation' under the statute.

²¹ Lord Scarman in the *Williams* case, *op. cit.* 148.

²² *Ibid.*

²³ Lord Wilberforce in the *Williams* decision, *op. cit.* 146, indicates that there will be no need to caution (English equivalent to Victoria's caveat) where the 'minor interest' concerned (equivalent to Victoria's equitable interest) is also an 'overriding interest' (equivalent to Victoria's express statutory exceptions in s. 42(2)(b) Transfer of Land Act 1958).

²⁴ *Taddeo v. Catalano* (1975) 11 S.A.S.R. 492; *IAC (Finance) Pty Ltd v. Courtenay* (1963) 110 C.L.R. 550. Refer Part 2 of this article.

²⁵ [1974] V.R. 523, 528.

act or omission has actually induced the subsequent interest holder to acquire his interest. If, as a result of the *Williams* decision, a wife living with her husband will today be in such occupation of land so as to give constructive notice of her rights to a purchaser, then it could be said that a purchaser will not be misled by any other postponing conduct on the part of the wife if she is in possession. Any possible postponing act or omission on the part of the wife will be nullified by the fact of occupation. As a result, an omission under the Torrens system such as failure to lodge a caveat at the relevant time will not necessarily be such an important factor leading to postponement. While it will always be relevant, it could not be said that failure to lodge a caveat will ever be fatal where the wife was in occupation. The purchaser of the equitable interest in *Taddeo v. Catalano*²⁶ had deliberately refrained from making enquiries which a prudent purchaser would have made and which would have revealed, *inter alia*, the wife Taddeo in occupation. It was there held that it would be inequitable to accord priority to the purchaser's later equitable interest by reason of any possible postponing conduct on the part of the wife Taddeo.

7. CONCLUSION

In conclusion, the warning by both Lord Wilberforce and Lord Scarman in the *Williams* decision that the law as it exists where the land is unregistered should be kept separate and distinct from the law existing where the land is registered should not be taken too lightly. It will be necessary for the High Court in Australia to take this sensible approach of the House of Lords into account if the law of constructive notice of spouses in occupation is ever to be settled. As Lord Scarman pointed out, under the English Land Registration Act 1925 'the wearisome and intricate task of examining title, and with it the doctrine of notice have been replaced by a statutory system of registration . . . [T]he statute has substituted a plain factual situation for the uncertainties of notice, actual or constructive, as the determinant of an overriding interest'.²⁷ In England the law has developed much further in the case of registered land than it has in the case of unregistered land. The House of Lords was aware of the hazards of equating the two systems and trying to keep them always at the same stage of development. As a result the protection of a wife's interest in the matrimonial home was able to be extended in the case of registered land, regardless of the state of the law in the case of unregistered land which could have had an inhibiting effect. In England the case of *Caunce v. Caunce* represented a situation of unregistered land where the purchaser took free of the preceding interest of a spouse because he had no constructive notice. The *Williams* case represented the case of registered land where the purchaser did not take

²⁶ *Op. cit.* 500.

²⁷ The *Williams* decision, *op. cit.* 149.

free of a preceding interest of a spouse because she was in actual occupation. However, should the *Caunce v. Caunce* situation arise today, whether it be under general law land in Australia, or unregistered land in England, the result would be different. Lord Wilberforce, by rejecting all three arguments from *Caunce v. Caunce*, has revealed that there is today no possibility of a purchaser of unregistered land *not* having constructive notice of the interest of a wife who is in occupation with her husband. In Victoria the law as it applies under general law and as it applies under the Torrens system should also be kept separate. We have seen that the High Court was concerned to equate the two situations and make constructive notice relevant to the application of an express statutory exception to indefeasibility under the Torrens system. This was not necessary. What is essential is that Parliament amend s. 42(2)(e) of the Transfer of Land Act 1958 (Vic.) to include the interest of a wife as a person who is automatically protected. Until such time, Victoria is faced with two distinct situations. Where the land is under general law, a wife's interest will be protected because her occupation will give constructive notice to a purchaser of her rights. Any other result, such as that under *Caunce v. Caunce*, would today be 'heavily obsolete'.²⁸ But where the land is under the Torrens system, unless the legislature intervenes in the manner mentioned, the unsatisfactory result will be that a wife's interest in the matrimonial home will never be protected against a purchaser or registered mortgagee who will simply claim indefeasibility of title.

²⁸ *Ibid.* 144.